United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-3047

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

HEMPSTEAD BANK,

Plaintiff-Appellant,

-against-

JAMES E. SMITH, Comptroller of the Currency of the United States and THE CHASE MANHATTAN BANK, NATIONAL ASSOCIATION,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the Comptroller's approval of Chase's application for a branch banking office abritrary and capricious where the community was static and mature and was already being adequately serviced by competing banks and where there was no demonstrated need for a branch bank?

2. Was the Comptroller's decision in violation of the applicable New York Statute and Regulations when there is no evidence in the record that it served and the Comptroller did not find it to serve the public convenience and advantage?

3. If the Comptroller did not make the findings required under New York State law was his decision beyond his Federal statutory authority?

4. Where the Comptroller made no findings that the community needed another bank but a subordinate set forth only some vague generalized conclusions, should the decision be annulled or alternatively, should the case be remanded for findings and reasons which underlie the Comptroller's decision and on remand should the District Court be instructed to determine from such reasons and findings whether there was a rational basis for the Comptroller's decision?

STATEMENT OF THE CASE

Hempstead Bank filed this action in the United States District Court for the Southern District of New York, to challenge the decision by JAMES E. SMITH, Comptroller of the Currency of the United States which had granted the application of CHASE MANHATTAN BANK,N.A. for a branch banking office in Locust Valley, New York.

HEMPSTEAD BANK contended that the Comptroller acted in an arbitrary, capricious manner and violated the applicable State and Federal statutes.

All of the parties moved for summary judgment. The Court below denied HEMPSTEAD BANK's motion, granted the motions of the defendants and dismissed the proceeding.

STATEMENT OF FACTS

On August 6, 1974, CHASE MANHATTAN BANK ("Chase") filed an application with the Comptroller for permission to establish a branch banking office on the east side of Birch Hill Road between Lindbergh and Davis Streets, Locust Valley, New York. As a part of this application Chase submitted a map of the Service Area to be served by the proposed branch. It includes the community of Locust Valley, the northeasterly residential portion of the City of Glen Cove and the surrounding residential communities of Lattingtown, Mill Neck and Matinecock. The portion of Glen Cove in the Service Area is a fully developed residential community with typical suburban homes and no undeveloped areas. Locust Valley is primarily residential with about thirty small retail stores in its central shopping area (A - 86). The communities of Mill Neck, Matinecock and Lattingtown are entirely residential and require minimal zoning of at least two acres.

Upon learning of the application, plaintiff, Hempstead Bank, filed a protest with the office of the Regional Administrator (A - 59). The letter indicated that there has been very minimal growth of population in the Service Area during the past five years. The letter also stressed that the Service Area is already being serviced

by two commercial banking offices and a savings bank which serve consumers of the area "with every conceivable type of banking services available" and that consumers already have the "benefit of competitive pricing".

The letter further indicated that Locust Valley had a population of 4,043 and the other communities of Lattington, Mill Neck and Matinecock had a joint population of 3,637. Furthermore, whereas the median family income in the latter communities in 1970 was $24,781, the median family income in Locust Valley was only $13,386. The Regional Administrator also received a letter opposing Chase's application, from Nassau Trust Company, which is the other commercial bank maintaining a branch office in Locust Valley. Nassau Trust Company requested a hearing and a fuller opportunity to present evidence in opposition to Chase's application.

The request for a hearing was denied as being a few days late (A 55-6). The Regional Administrator subsequently interviewed an officer of the plaintiff Hempstead Bank, who"strongly objected on the grounds that the community is adequately serviced at present and that it cannot support additional competition without adversely affecting the [existing banks]...that deposits and loans in his Bank's branches in the area have either remained relatively stable or diminished slightly since 1970". (A - 38).

The Regional Administrator conceded some validity to the objections of Hempstead Bank that deposit growth of the proposed branch could only come at the expense of the existing banks but he suggested that some area residents now banking at New York City branches might switch their accounts to the new branch and that this new branch might be more convenient for them. (A - 38) The Regional Administrator concluded that Hempstead Bank's objections had "little merit" and recommended that Chase's application be grantled. In his investigation the National Bank Examiner found that there has been only two (2%) percent growth in population since 1970 and due to lack of available land and restrictive zoning requirements "future growth will be minimal". (A-30)

Furthermore, he found:

> "that the only new business planned for the area will be located in an office building... on Forest Avenue, adjacent to the branch of the Hempstead Bank". (A -30)

Nevertheless, he recommended that the application be approved citing as favorable reasons:

> "Establishment of a branch would add competitive factor to area, would enable bank to extend its facilities into area not currently serviced by applicant. Affluence of area would seem to indicate that it can support proposed branch without causing greatly adverse conditions". (A - 24)

The Deputy Comptroller approved the application, following which the Acting Comptroller did likewise, without making any findings as to public convenience or necessity for the branch and without furnishing any reasons whatsoever for his decision. (A -22)

POINT I

THE COMPTROLLER'S DECISION WAS ARBITRARY AND CAPRICIOUS AND SHOULD BE SET ASIDE

The Comptroller's power to approve new branches for National banks, is set forth in §36(c) of the National Banking Act, 12 USC §36(c) which provides:

> "A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches***at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question."

Thus, the Comptroller is bound by New York State law. The relevant State statute is §29 of the New York Banking Law which provides:

> "When a banking organization authorized by this chapter to open a branch office shall make written application for leave to do so, the superintendent, <u>if he shall find upon investigation that the public convenience and advantage will be promoted by the opening of such branch office</u>;*** shall issue a certificate*** under his hand and the official seal of the department***. (underlining added)

Thus, the State Superintendent, before approving a branch office, would have to find that the new office would serve the public convenience and advantage and hence the

Comptroller must do likewise.

In the present case the Comptroller made no such express findings. His approval simply took the form of signing his name next to the word "approved".(A - 22) His Deputy Comptroller did approve a subordinate's recommendation, making the following findings:

> "This is a lucrative market in which applicant is not represented. Houses for the most part are single family and of quality construction. Entry will stimulate competition and can be supported by available business".(A - 25)

The proper test for judicial review of the Comptroller's decision was set forth by the Supreme Court in Camp vs. Pitts, 411 US 138 (1973). That case is often cited but not scrutinized to see exactly what the high court held. In that case the Comptroller had rejected an application to organize a new bank, stating he was "unable to reach a favorable conclusion as to the need factor; he elaborated on his decision thus:

> "On each application we endeavor to develop the need and convenience factors in conjunction with all other banking factors and in this case we were unable to reach a favorable conclusion as to the need factor. The record reflects that this market area is now served by The Peoples Bank...The Bank of Hartsville...The First Federal Savings & Loan Association..The Mutual Savings & Loan Association...and the Sonoco Employees Credit Union..."411 US at 139

On appeal the Court of Appeals held that the Comptroller's ruling was "unacceptable" because "its basis" was not stated with sufficient clarity to permit judicial review. 463 F. 2d 632, 633. The Comptroller did not challenge that aspect of the Court's decision but asserted that the Court of Appeals was wrong in requiring the District Court to hold a de novo hearing into the facts.

On appeal the Supreme Court held that where there was

> "such failure to explain[the] administrative action as to frustrate effective judicial review, the [proper] remedy was...to obtain from the agency through affidavits or testimony such additional explanation of the reasons for the agency decision as may prove necessary". (41' U.S. pgs 142-143)

The Court alluded to its decision in the case Citizens to Preserve Overton Park vs. Volpe, 401 US 402 (1971) where the Administrator had given no reasons for that decision. In Camp vs. Pitts, the Comptroller had given some brief reasons and the Supreme Court remanded to the Court of Appeals to determine whether the record supported the Administrator's decision. The Supreme Court noted that--and this is particularly significant to the present case:

> "If that finding is not sustainable on the administrative record made, then the Comptroller's decision must be vacated and the matter remanded to him for further consideration. See SEC vs.

Chenery Corp. 318 US 80 (1942)."

Hence, even though the Comptroller had in Camp vs. Pitts recited some reasons for denying the application, the Supreme Court remanded and required the Court of Appeals to determine whether there was a rational basis in the record for the Comptroller to reach the decision he made. Here, on the other hand, we have an even more extreme case of administrative shorthand. In noting his approval the Acting Comptroller made no findings whatever, gave no reasons whatsoever for his decision and gave no indication at all that he had paid any attention to even the slightest part of the record (A -25). Does not this--as the Supreme Court held, "frustrate effective judicial review?" We submit, it certainly does. How can this Court determine whether he even paid any attention to the statute? §36(c) of the National Bank Act requires him to apply applicable State law. Absent some affirmative indication from him, how can this Court know that he was cognizant of the relevant State law?

As the First Circuit held, in First National Bank & Trust Co. vs. Smith, 509 F. 2d 663,666 (1975):

> "Until the Comptroller makes it clear whether or not the applicable state standard was taken into account in rendering his decision, it cannot be determined that his approval was in 'accordance with law' ". [5 U.S.C. §706(2)(A).]

Time and time again the Federal courts around the country have criticized the Comptroller for making decisions in such a curt manner that the courts cannot perceive the basis for his decision. See, for instance Citizens National Bank of South Maryland vs. Camp, 317 Fed Sup 1389, (1970) where plaintiff bank opposed an application of a large bank for a branch office. The Comptroller held a hearing and granted the application. The Maryland statute contained no objective restrictions on location but required the Banking Commissioner to find that public convenience and advantage would be promoted by opening a branch office. The U.S. District Court held that this requirement was binding on the Comptroller. The Court noted that the Comptroller made no findings of fact and issued no opinion

> "despite the fact that the practice of rendering written opinions setting out the basis of the Comptroller's determination had been adopted after Professor Davis had severely criticized the previous practice...The criticism by Professor Davis echoed that made by Judge Sobeloff, dissenting in First National Bank of Smithfield vs. Saxon, 352 F 2d 267. The opinion of the majority in that case did not disagree with the criticism. In the instant case, the Comptroller merely wrote his signature after the printed word "Approve" on the third page of a three page form. ...There was no opinion, no statement of findings or conclusions, no indication what evidence the Comptroller had considered, nothing whatever to show that he had ascertained to his satisfaction that the public

> convenience and advantages will be promoted by the opening of the proposed branch.
>
> It is a reasonable inference that the Comptroller considered particularly the final recommendation of his Deputy that the public convenience and advantage would be promoted by the opening of the proposed branch...His recommendation was based on the convenience of the applicant bank and its existing customers [at other branches]. It appears he ignored the provision of the Maryland statute. The words 'public convenience and advantage' means something more than the convenience and advantage of the applicant bank and its existing customers at some other branch (p.1393)

Another significant and quite similar case is First National Bank of Catawba County vs. Wachovia Bank & Trust Company 325 F. Supp 523 (1971). In this case Wachovia Bank had applied to the Comptroller for permission to open a branch office in Hickory, North Carolina. The Comptroller approved the branch application and plaintiff brought suit to have the Comptroller's approval set aside. The Comptroller in approving the branch application expressly declined to make the findings concerning public needs and convenience which were required by North Carolina law of the State Commissioner on Banks before he could approve a branch application. The District Court noted that the Comptroller specifically stated that it was

> "unclear as to whether the competitive factors present were sufficient to 'satisfy the North Carolina needs and convenience' test when, as contended by the protestants, the community already

receives fine service from existing banks."

The Court concluded that since the Comptroller had not made the findings requisite under North Carolina law, the Comptroller's approval was a "nullity" and he was permanently enjoined from issuing an approval to Wachovia Bank for a branch bank at that location.

These cases were not overruled by the Supreme Court decision in Camp vs. Pitts; in fact, the Supreme Court implicitly affirmed the logic of these decisions when it held that where effective judicial review is frustrated by inadequate findings the Comptroller must indicate the basis for his decision by affidavits or testimony upon a remand.

In the present case even the conclusion of the Deputy Comptroller (which is only a recommendation to the Comptroller and is not the final agency decision) does not recite that there is a need for an additional branch in this location, or that the evidence in the record demonstrated some need in the community for this additional bank branch. He did not find, for instance, that Locust Valley was a growing area, nor that existing banks could not adequately

serve an increasing population or burgeoning business needs of the community. Parenthetically, of course, it may be noted that he did not make any such findings because even his own investigation showed that the community is completely static, there is little or no new business coming into the area and there is minimal population growth. (A-30)

The situation here should be contrasted with such cases as Citizens National Bank of Gastonia vs. Wachovia Bank & Trust Company, 329 F. Supp 585 (1971) where the District Court found a "real need for the constructive convenient competition of a local office" and First Citizens Bank & Trust Company vs. Camp, 409 F.2d 1086 (4th Cir.1969) where the Court found the area to be burgeoning, enjoying phenomenal growth and in need of additional banking competition. Similarly, in First Bank & Trust Co. vs. Smith, supra, cited for support by the Court below, the Court of Appeals found:

> "enough support in the record concerning possible inadequacy and inaccessibility of present banking facilities...to provide a rational basis for the Comptroller's approval". (509 F.2d at 666)

Rather, the factual milieu in the present case is much more like that in Bank of New Bern vs.Wachovia Bank & Trust Company and Camp, 353 F. Supp.643 (1972). There,

too, plaintiff bank sought a judgment invalidating the Comptroller's decision which had approved establishment of a new branch by a large State wide bank. The Comptroller had approved the branch application without any formal opinion setting forth his findings and conclusions. The North Carolina law requires for a new branch, the Commissioner of Banks to determine the financial history and condition of the applicant bank, that establishment of the branch will meet the needs and promote the convenience of the community and that probable volume and demand of business will insure the solvency of the branch and existing banks in the community. The Comptroller conceded that these requirements were binding on him and stated in his Answer in the District Court suit that he had taken into account the requirements of North Carolina law.

The plaintiff introduced evidence that the three existing banks were offering a full range of banking services at competitive rates; the area had lost population in recent years and that its current population--to--banking office ratio was 2340 to 1 whereas in the entire State it was 4515 to 1 and that there were no industries in the area that required international banking facilities.

In annulling the Comptroller's decision, the Court concluded that:

"evidence is uncontradicted that existing banks offer a full complement of banking services at competitive rates--that the only specialized services offered by Wachovia which are not offered by existing banks are larger lending limits and international banking for which the likelihood of any need now or in the future has not been shown; that there is no indication that the management of existing banks has not been active and vigorous; population growth of the county remains static... competition among existing banks is not lacking; and that there is no indication that Wachovia's proposed branch has public support in the community".

The findings and conclusion of the Deputy Comptroller in the present case were simply set forth in three sentences, each of which bears careful scrutiny as to its rationality:

"This is a lucrative market in which applicant is not represented."

Query: Is this either public convenience or advantage as required by the New York statute? Of course not. It simply implies that CHASE MANHATTAN BANK can hopefully derive some potential profit from this new branch.

"Houses for most part are single family and of quality construction"

Query: Does this fact logically lead to or even justify the conclusion that a new branch is needed?

Considering the evidence that this is a stable mature residential community with no new housing built in the last ten years, with only minimal population growth

in recent years and none anticipated; with only a "small number of retail establishments" (A - 30), how is this conclusion deducible from the evidence if not in an arbitrary and capricious manner? There is no evidence whatsoever in the record of any need for additional banking services or that Chase would furnish any new or innovative services.

"Entry will stimulate competition and can be supported by available business."

Query: The conclusion that "entry will stimulate competition" requires a premise, does it not, that either there is no presently existing banking competition or that in the public interest the existing bank competition needs stimulating? Yet, the evidence is undisputed that there are already two commercial banks, plaintiff and Nassau Trust Company, as well as a prospering savings bank in Locust Valley and in its application Chase did not indicate that it would be offering any services not already offered by the existing commercial banks, both of which are strong institutions (A-35).

"Entry will stimulate competition" is not to be accepted by this Court as a glib conclusion which will automatically justify a decision approving a new branch bank. Courts will no longer accept and rubber stamp a broad conclusion in an administrative agency decision unless

the Court can perceive that there was a rational basis in the record for that decision.

Federal courts have in recent years recognized that administrative "powers are not boundless and unless administrative action is tempered by judicial supervision, 'expertise, the strength of modern government can become a monster which rules with no practical limits on its discretion'. Burlington Truck Lines Inc. vs. U.S. 371 US 156,167." Columbia Broadcasting System Inc. vs. F.C.C. 454 F. 2d 1018,1028 (D.C. Cir. 1971)

This Court reiterated in Consumers Union of U.S. Inc. vs. Consumers Products Safety Commission, 491 F. 2d 810 (1974) that there must be a reasoned basis for administrative agency action.

In Environmental Defense Fund, Inc. vs. Ruckelshaus 439 F. 2d 584, 597-598, the Court of Appeals held:

> "We stand on the threshold of a new era in the history of the long and fruitful collaboration of administrative agencies and reviewing courts. For many years, courts have treated administrative policy decisions with great deference, confining judicial attention primarily to matters of procedure. On matters of substance, the courts regularly upheld agency action, with a nod in the direction of the 'substantial evidence' test, and a bow to the mysteries of administrative expertise. Courts occasionally asserted, but less often exercised, the power to set aside agency action on the ground that an impermissible factor had entered into the decision, or a crucial factor had not been considered. Gradually, however, that power has come into more frequent use, and with it,

> the requirement that administrators articulate the factors on which they base their decisions.
>
> Strict adherence to that requirement is especially important now that the character of administrative litigation is changing. As a result of expanding doctrines of standing and reviewability, and new statutory causes of action, courts are increasingly asked to review administrative action that touches on fundamental personal interests in life, health and liberty. These interests have always had a special claim to judicial protection, in comparison with the economic interests at stake in a ratemaking or licensing proceeding.
>
> To protect theseinterests from administrative arbitrariness, it is necessary, but not sufficient, to insist on strict judicial scrutiny of administrative action. For judicial review alone can correct only the most egregious abuses. Judicial review must operate to ensure that the administrative process itself will confine and control the exercise of discretion. Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible. Rules and regulations should be freely formulated by administrators, and revised when necessary. Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought." (Emphasis supplied)

While the Deputy Comptroller stated that "entry will stimulate competition" he failed to go forward and indicate what type of additional competition was needed in Locust Valley, why it would not be destructive to those banks already competing and why it would be in the public interest.

The courts have carefully scrutinized such administrative claims of the supposed benefits of competition to see whether initially there is a need for more competition and then secondly, to see whether such benefits are actual and tangible or on the other hand only illusory.

The Comptroller's order "must be upheld if at all on the same basis articulated in the order by the agency itself," Burlington Truck Lines vs. United States, 371 U.S. 168-69 . If the Comptroller justifies his decision herein on the theory of stimulation of competition, the record bears scrutinizing to determine whether there was any demonstrated need for additional competition.

A case very similar to the present one was Bank of Haw River vs. Saxon , 257 F. Supp.74 (1966) where a bank instituted suit to restrain the Comptroller from allowing a competitor to establish a branch office. The District Court concluded that the service area was already overbanked even without the branch which the Comptroller had authorized. The Court found that the two existing banks amply met the banking needs of the service area. In language which is strikingly similar to the conclusion one must draw from both Chase's application and the recommendations of the Comptroller's subordinates here, the Court went on to note that the defendants' witnesses were:

> "unable to cite any significant need or necessity for the addition of another

banking office in the community. Most of their testimony was based on civic pride and the notion that competition in every kind of business is good. The answer to this argument is that strong competition already exists among the various banks of the area." (Emphasis supplied)

In Federal Communications Commission vs. R.C.A. Communications, 346 US 86, 94 (1953) the Supreme Court criticised a decision of the Federal Communications Commission which had authorized some new facilities on the ground that they would provide more competition. The Supreme Court criticised this policy thus:

" Had the Commission clearly indicated that it relied on its own evaluation of the needs of the industry rather than on what it deemed a national policy, its order would have a different foundation There could be no doubt that competition is a relevant factor in weighing the public interest...Our difference arises from the fact that while the Commission recites that competition may have beneficial effects it does so in an abstract, sterile way. Its opinion relies in this case not on its independent conclusion, from the impact upon it of the trends and needs of this industry, that competition is desirable but primarily on its reading of national policy, a reading too loose and too much calculated to mislead in the exercise of the discretion entrusted to it. To say that national policy without more suffices for authorization of a competing carrier wherever competition is reasonably feasible would authorize the Commission to abdicate what would seem to us one of the primary duties imposed on it by Congress...it is not too much to ask that there be ground for reasonable expectation that competition may have some beneficial effect. Merely to assume that competition is bound to be of advantage, in an industry so regulated and so largely closed as is this one, is not enough."

Similarly, in Hawaiian Telephone Company vs. F.C.C., 498 F. 2d 771 (D.C. Cir. 1974) the Court of Appeals noted that the F.C.C. had justified its decision approving new facilities on the basis that they provided more competition and that such competition served the public interest.

The Court of Appeals held however:

> "Competition is without a doubt a factor to be weighed in determining where the public interest lies. However, the F.C.C. cannot merely assert the benefits of competition in an abstract, sterile way...The whole theory of licensing and regulation by government agencies is based on the belief that competition cannot be trusted to do the job of regulation in that particular industry which competition does in other sectors of the economy. Without in any way derogating the merits of the competitive free enterprise system in the economy as a whole, we cannot accept the action of the F. C.C. here in a tightly regulated industry, supported by an opinion which does no more than automatically equate the public interest with additional competition."

The Court of Appeals remanded the case to the F.C.C. for reconsideration of its decision and held that if on such reconsideration the F.C.C.'s

> "conclusion remains the same it must 'at least warrant' that competition will serve some beneficial public interest here. While the Commission need not make 'specific findings of tangible benefit' it must go beyond its bare assertion of benefit. It must provide the basic facts which lead it to reach its conclusion of public benefit from the decision. If such basic facts have not been developed in the prior agency proceedings and record, then hearings or supplemental inquiry may be necessary.

> "Following the Supreme Court in RCA, supra and other decisions, this court has long required that agencies present sufficient support for their conclusions in order that the court can properly review their decision. The court and the parties, must not be left with post hoc rationalizations by counsel as the prime authority for the Commission decision." (498 F. 2d 777)

If the Comptroller had deduced from the evidence that there was a need for an additional bank in Locust Valley he should have articulated it. Otherwise, judicial review is impossible and becomes only a hollow gesture. In American Smelting & Refining Co. vs. Federal Power Commission 494 F. 2d 925, 944-945 (1974) the Court of Appeals reiterated:

> "As we have stated many times in the past the failure of an administrative agency to articulate the reasons for a particular decision makes meaningful review of that decision impossible."

Similarly, in Appalachian Power Co. vs. Environmental Protective Agency, 477 F. 2d 495, 507 (1973) the 4th Circuit was most explicit:

> "And when this Court reviews the action of the Administrator, it does not confine itself to the order of the Administrator or to the bare language of the state plan, nor will it seek to determine from the four corners of those two documents whether the action taken was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' If judicial review were to be tethered to these abbreviated documents, it would almost inevitably become a meaningless gesture and would be reduced to a game of blind man's bluff'. Courts require that administrative agencies 'articulate the

> criteria' employed in reaching their result and are no longer content with bare administrative ipse dixits based on supposed administrative expertise. Environmental Defense Fund Inc. v. Ruckelhaus, supra, at 586 of 439 F. 2d. While an agency may have discretion to decide '[D]iscretion to decide does not include a right to act perfunctorily or arbitrarily'; and, in order for a court to make a critical evaluation of the agency's action and to determine whether it acted perfunctorily or arbitrarily ' the agency must in its decision' explicate fully its course of inquiry, its analysis and its reasoning.' Ely v. Velde (4th Cir.1971) 451 F 2d 1130,1138-1139. And, in making its review, the Court must have, not merely that full articulation of the agency's reasoning, but it must also have 'the whole record' on which the agency acted, or, as it is expressed in Overton Park, ' the full administrative record that was before the Secretary at the time he made his decision.' This is so, because in its review, the Court is to 'engage in a substantial inquiry' into the reasonableness of the agency action (Section 706, 5 U.S.C.) and as part of that 'inquiry' it 'must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment' (Overton Park, supra, 401 U.S. at 415-416, 91 S.Ct. at 823-824) since it is 'arbitrary or capricious' for an agency not to take into account all relevant factors in making its determination."

Applying these rules it is apparent that this Court is being precluded from effectively reviewing the Comptroller's decision because that decision lacked findings and rational conclusions . the present record this Court can only either rubber-stamp his decision (which is meaningless) or annul it.

POINT II

THE COMPTROLLER DISREGARDED APPLICABLE NEW YORK LAW

In First National Bank of Logan vs. Walker Bank & Trust Company, 385 US 252 (1966) the Supreme Court held that with regard to branch banking Congress "intended to place national and state banks on a basis of 'competitive equality' " and whatever is 'part and parcel'of the State's branching policy concerning state banks is applicable to national banks as well".

That being so, the Comptroller is bound by the rules of the New York State Banking Board as well as by the Banking Law of the State of New York. New York State Banking Law, §29, provides that the Superintendent of Banks can approve an application for a branch office "if he shall find upon investigation that the public convenience and advantage will be promoted by the opening of such branch office".

In its General Regulations, Part 29, the New York State Banking Board amplified §29 of the statute and set out various supplemental provisions. The Banking Board delegated to the Superintendent the power to approve branches subject to the rules set forth in that Regulation, e.g.,

> "In acting upon bank and trust company branch applications, the Superintendent

> shall give consideration to the character and extent of the area to be served by the proposed branch. Normally there should be a population of 5,000 persons per commercial bank facility within a reasonably defined service area".

The population of the service area as submitted by the applicant (A-76) and accepted by the Comptroller (A-34) was 10,150. Thus, considering the two bank branches already in the service area there was demonstrated no need for the proposed branch. Especially is this true in the light of the documentation submitted by plaintiff in support of its motion which showed that the population in the service area according to Long Island Lighting Company records was 9,669. (A -121 - 125)

Here, not only was there no need for this additional branch office--both from the standpoint of lack of growth in the community and also considering the standards in the New York State regulations--but furthermore, there was no finding by the Comptroller that public convenience and advantage would be promoted thereby. [§ 29]

As noted above, the New York State Banking Law requires in the case of an application by a State bank, that the Superintendent find:

> "that the public convenience and advantage will be promoted by the opening of such branch office"

Applying the same standard, the Comptroller is hence required to make the same finding.

Here, the Comptroller has made no such findings, has issued no written opinion setting out any reasons as to why an additional branch was required or appropriate at this location or why it was in the public's interest or to the public's convenience or advantage to have another branch located there.

As the District Court held in Citizens National Bank of So. Maryland, supra,

> "The words 'public convenience and advantage' means something more than the convenience and advantage of the applicant bank and its existing customers at some other branch." (p.1393)

Accordingly, since the Comptroller did not make these necessary findings his decision must be annulled.

There is yet another reason why the Comptroller's decision should be annulled. In First Bank & Trust Company vs. Smith, supra, as in the present case, an opponent of the application--(in the present case it was Nassau Trust Company--(A-43), challenged whether the proposed branch would be legally permissible under State law. In that case, as here, the Comptroller's subordinates answered the question on the U.S. Treasury form whether under the State's branch banking law, the applicant could legally establish

a branch, with a one word answer "Yes". In First Bank & Trust Company, the Court of Appeals held that the response was "so meager as to suggest that respondent (Comptroller) did not grasp the nature of the legal claim. (509 F. 2d at 666) In fact, the Comptroller's own form provides:

> "If there is any question as to legality an opinion of bank's counsel should be obtained" (A-27)

Here, none was requested or obtained.

Although the Court below in the present case cited First Bank & Trust Company as support for its decision, actually in that case the First Circuit remanded for the District Court to determine whether the Comptroller took into account the relevant State legal standard. Similarly, here at the very least, the Comptroller's nonexistent findings and unsupported conclusions require remand; upon a closer review of his decision, the Comptroller's decision is so irrational when viewed from the standpoint of the need for another bank in this hamlet that the decision should be annulled.

POINT III

THE DISTRICT COURT ERRED IN ITS APPLICATION OF THE LAW

The Supreme Court decision in Camp vs. Pitts requires the District Court to "obtain from the agency through affidavits or testimony such additional explanation of the reasons for the agency decision as may prove necessary". (411 US at 142-143). Considering the deficient administrative record the District Court failed to recognize this requirement and simply reiterated in its opinion some of the bald facts from the Chase application. (A-129) Although the District Court seemingly understood it had to find a "rational basis for the [administrative] decision" (A-128) it failed to search the administrative record for logical reasons for the decision. Rather, it simply and briefly stated in language almost identical to that set forth in the Comptroller's report that the community would be benefited and that the affluence of the area would prevent the existing banks from suffering. (A-129, A-124)

Plaintiff submits that a decision such as this by the District Court simply amounts to a "rubber stamping" of the administrative decision. The Court below failed to perform the duty required of it under Camp vs. Pitts and the other cases cited above in Point I. By his failure

to make adequate findings and furnish reasons for his decision the Comptroller has frustrated effective judicial review and plaintiff submits the Court below simply adopted the Comptroller's conclusions without analysis to determine whether they had a rational basis.

As set forth in Environmental Defense Fund and F.C. C. vs. R.C.A., supra, the Appellate process demands more of a court.

In Columbia Broadcasting System, Inc. vs. F.C.C., supra, the Court of Appeals noted:

> "Cognizant of the potential hazards of unbridled administrative discretion, Congress has wisely devised a scheme whereby agencies and courts together constitute a 'partnership' in furtherance of the public interest".(454 F. 2d at 1028)

The Comptroller's decision tries to justify itself on the loose concept that the new branch will bring more competition into this area. But as the Supreme Court pointed out in F.C.C. vs. R.C.A. ,supra, it is too dangerous for the courts to simply rubber stamp administrative decisions when they are based on generalized platitudes about increased competition. If it were that simple then there would be no need for administrative agencies to approve bank branches; banks could simply branch wherever they wanted to because the increasing competition would supposedly

automatically benefit the public. Obviously, the law is to the contrary; governmental agencies approve bank branches when such branches are in the public interest and the decisions of these agencies are subject to review by the courts. As pointed out in Hawaiian Telephone Company vs. F.C.C. supra, in these regulated industries the agencies must show in its decision,with specific findings that there is a need for increased competition in the specific factual milieu of the case. Only by requiring and then evaluating the agency's reasons and findings can the courts perform their "partnership" function of determining whether the administrative decision was "arbitrary, capricious or not in accordance with law". [5 U.S.C. §706 (2)(A)]

CONCLUSION

The Comptroller's decision here was so irrational--there being no demonstrated need in the record for another bank, and the supposed benefits of increased competition being only unspecified and hence only conjectural, the decision should be annulled. Alternatively, faced with an administrative record devoid of findings and the Comptroller's conclusions lacking both an explanation and a rational basis in the record, this Court's function of judicial review as set forth in Camp vs. Pitts has been frustrated to the point that it cannot be effectively performed. That being so, the Court should remand so that the Comptroller can amplify his reasons and the District Court can then evaluate his decision in the light of his reasons and findings.

The decision below should be reversed.

RESPECTFULLY SUBMITTED,

DALTON & HENOCH,
Attorneys for Plaintiff,

GILBERT HENOCH
Of Counsel

706. **Scope of review.**—To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall —

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Sept. 6, 1966, P. L. 89-554, § 1, 80 Stat. 393.)

Prior law.—This section is based on Act June 11, 1946, c. 324, § 10(e), 60 Stat. 243 (§ 1009(e) of former Title 5).

¶ 436. Branches of National Banks—Retention after Merger.—The conditions upon which a National banking association may retain or establish and operate a branch or branches are the following:

(a) A National banking association may retain and operate such branch or branches as it may have in lawful operation at the date of the approval of this Act, and any national banking association which has continuously maintained and operated not more than one branch for a period of more than twenty-five years immediately preceding the approval of this Act may continue to maintain and operate such branch.

(b) (1) A national bank resulting from the conversion of a State bank may retain and operate as a branch any office which was a branch of the State bank immediately prior to conversion if such office—

(A) might be established under subsection (c) of this section as a new branch of the resulting national bank, and is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank;

(B) was a branch of any bank on February 25, 1927; or

(C) is approved by the Comptroller of the Currency for continued operation as a branch of the resulting national bank.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the national bank) resulting from the conversion of a national bank would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the national bank immediately prior to conversion.

(2) A national bank (referred to in this paragraph as the "resulting bank"), resulting from the consolidation of a national bank (referred to in this paragraph as the "national bank") under whose charter the consolidation is effected with another bank or banks, may retain and operate as a branch any office which, immediately prior to such consolidation, was in operation as—

(A) a main office or branch office of any bank (other than the national bank) participating in the consolidation if, under subsection (c) of this section, it might be established as a new branch of the resulting bank, and if the Comptroller of the Currency approves of its continued operation after the consolidation;

(B) a branch of any bank participating in the consolidation, and which, on February 25, 1927, was in operation as a branch of any bank; or

(C) a branch of the national bank and which, on February 25, 1927, was not in operation as a branch of any bank, if the Comptroller of the Currency approves of its continued operation after the consolidation.

The Comptroller of the Currency may not grant approval under clause (C) of this paragraph if a State bank (in a situation identical to that of the resulting national bank) resulting from the consolidation into a State Bank of another bank or banks would be prohibited by the law of such State from retaining and operating as a branch an identically situated office which was a branch of the State bank immediately prior to consolidation.

(3) As used in this subsection, the term "consolidation" includes a merger.

(c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such state may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and

surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(d) The aggregate capital of every national banking association and its branches shall at no time be less than the aggregate minimum capital required by law* for the establishment of an equal number of national banking associations situated in the various places where such association and its branches are situated.

(e) No branch of any National banking association shall be established or moved from one location to another without first obtaining the consent and approval of the Comptroller of the Currency.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid or money lent.

(g) This section shall not be construed to amend or repeal section 25† of the Federal Reserve Act, as amended, authorizing the establishment by National banking associations of branches in foreign countries, or dependencies, or insular possessions of the United States.

(h) The words "State bank," "State banks," "bank," or "banks," as used in this section, shall be held to include trust companies, savings banks, or other such corporations or institutions carrying on the banking business under the authority of State laws. (Rev. Stat. Sec. 5155; amended by Sec. 7, Act Feb. 25, 1927, 44 Stat. L. 1228; Sec. 23, Act June 16, 1933, 48 Stat. L. 189, 190; Sec. 305, Act Aug. 23, 1935; Sec. 2(b), Act July 15, 1952, 66 Stat. L. 633; Act Sept. 28, 1962; 76 Stat. L. 667; 12 U. S. C. 36.)

(Next page is 283)

* See ¶468.

† See ¶¶3176-3184.

Library References

Banks and Banking ⇐33. C.J.S Banks and Banking § 55.

§ 29. Branch offices; approval or refusal; certificate; investigation fee

When a banking organization authorized by this chapter to open a branch office shall make written application for leave to do so, the superintendent, if he shall find upon investigation that the public convenience and advantage will be promoted by the opening of such branch office and, in the case of a stock corporation, that such corporation has the amount of capital stock required by this chapter for the opening of such office, shall submit such application to the banking board. At the time of making such application, an investigation fee of five hundred dollars shall be paid to the superintendent for each branch office for which leave to open is sought. If three-fifths of the members shall vote for approval of such application, the superintendent shall issue a certificate in triplicate under his hand and the official seal of the department authorizing the opening and occupation of such branch office and specifying the date on or after which and the conditions under which it may be opened and the place where it shall be located. The superintendent shall cause one of such triplicate certificates to be transmitted to the applicant, another to be filed in the office of the department and the third to be filed in the office of the clerk of the county in which the principal office of the applicant is located. If the superintendent shall not find that the public convenience and advantage will be promoted by the opening of such branch office or if the applicant has not the requisite amount of capital stock or if three-fifths of the members of the board shall not vote for approval of such application, the superintendent shall notify the applicant that its application has been denied.

No investigation fee for branch applications shall be collected from applicants if such branch applications are filed in conjunction with proceedings under sections one hundred thirty-six, three hundred twelve, four hundred ten or subdivision eight of six hundred five.

A safe deposit company shall not be required to pay a fee on making an application to open a branch.

The banking board by general regulation may delegate to the superintendent its authority to approve applications by banks and trust companies to open branch offices, or certain classes of such applications specified by the board, pursuant to such standards as the board by general regulation may establish. In case of any application to open a branch office with respect to which the banking board has made such delegation to the superintendent, he may approve such application without submitting it to the banking board, and, if he so approves, shall issue a certificate in triplicate under his hand and the official seal of the department authorizing the opening and occupation of such branch office and specifying the date on or after which and the conditions under which it may be opened and the place where it shall be located, and shall cause one of such triplicate certificates to be transmitted to the applicant, another to be filed in the office of the department and the third to be filed in the office of the clerk of the county in which the principal office of the applicant is located.

L.1914, c. 369; formerly § 51; amended L.1927, c. 178, § 7; L. 1932, c. 399, § 2; renumbered 29 and amended L.1938, c. 684, § 26; L.1944, c. 52, § 4; L.1956, c. 464, § 2; L.1960, c. 555; L. 1966, c. 324, § 4, eff. May 10, 1966.

Historical Note

L.1966, c. 324, § 4, eff. May 10, 1966, omitted reference to section 601 in par. beginning "No investigation", and added par. beginning "The banking board."

Derivation. Section 109 of the Banking Law of 1909; repealed by section 700 of this chapter; section 186 of the Banking Law of 1909; amended L.1911, c. 687; L.1913, c. 317; repealed by section 700 of this chapter. Said section 109 of the Banking Law of 1909 was from section 89 of the Banking Law of 1892; amended L.1898, c. 410; repealed L. 1909, c. 10; originally revised from L.1882, c. 409, § 305. Said section 186 of the Banking Law of 1909 was from section 156 of the Banking Law of 1892; amended L.1893, c. 696; L. 1901, c. 660; L.1904, c. 492; L.1905, c. 414; L.1906, c. 601; L.1908, cc. 184, 194; repealed L.1909, c. 10; originally revised from L.1887, c. 546, §§ 11, 21, 28, 35.

Former section 29. Renumbered 40.

Effective date of L.1966, c. 324. See note under section 240.

Cross References

Banking board, approval by, see section 14.
Branch offices, maintenance by
Banks and trust companies, see section 105.
Credit unions, see section 460.
Foreign corporations, see section 131.
Industrial banks, see section 202.

PART 29

DELEGATION TO SUPERINTENDENT OF ACTION ON CERTAIN COMMERCIAL BANK BRANCH APPLICATIONS

(Statutory authority: Banking Law, § 29)

Historical Note

Part 29 (§§ 29.1—29.4) repealed, new Part 29 (§§ 29.1—29.6) added filed Sept. 19, 1972 eff. Aug. 9, 1972.

Section 29.1 Branches located in any city with a population of 75,000 or more. The Banking Board hereby authorizes the incumbent superintendent, for the period ending December 31, 1974, to approve applications of banks and trust companies to open branch offices within the corporate limits of any city in the State of New York with a population in excess of 75,000, without submitting such applications to the Banking Board.

(a) *Service area and population.* In acting upon bank and trust company branch applications, the superintendent shall give consideration to the character and extent of the area to be served by the proposed branch. Normally there should be a population of 5,000 persons per commercial bank facility within a reasonably defined service area. In congested areas or in the case of shopping centers or areas which exceed 275,000 square feet of selling space, a service area may be shared with other commercial bank facilities. In service areas of above average income or in service areas consisting primarily of working population, a reduction in the population requirement stated above shall be permitted. In residential service areas of lower than average income, a higher population shall be required.

(b) *Spacing and placement.* Branch locations in New York State approved pursuant to this Part shall be located in the immediate vicinity of local or regional shopping concentrations, transportation transfer points or important office building complexes. If the required population per commercial bank facility is present, a minimum distance between commercial bank facilities shall not be required.

Historical Note

Sec. amd. filed Aug. 18, 1972; repealed, new added filed Sept. 19, 1972; amds. filed: Jan. 12, 1973; Dec. 26, 1973 eff. Dec. 31, 1973. Changed "December 31, 1973" to "December 31, 1974."

29.2 Branches located in the immediate vicinity of shopping centers or shopping areas either in existence or which are to be completed within one year. The Banking Board hereby authorizes the incumbent superintendent for the period ending December 31, 1974, to approve applications of banks and trust companies to open branch offices without submitting such applications to the Banking Board, which offices are located within, or in the immediate vicinity of, shopping centers or shoppng areas, provided, however, that the superintendent finds that the shopping center or area:

(a) is either in existence or the applicant has presented competent evidence indicating there is reasonable assurance it will be completed within one year; and

(b) contains or will contain at least 100,000 square feet of selling space.

Historical Note

Sec. amd. filed Aug. 18, 1972; repealed, new added filed Sept. 19, 1972; amds. filed: Jan. 12, 1973; Dec. 26, 1973 eff. Dec. 31, 1973. Changed "December 31, 1973" to "December 31, 1974."

29.3 Overseas branches. (a) The Banking Board hereby authorizes the incumbent superintendent, for the period ending December 31, 1974, to approve applications of banks and trust companies having a combined capital stock and surplus fund of $50 million or more to open overseas branch offices without submitting such applications to the Banking Board.

(b) In acting upon such application, the superintendent shall consider the dollar amount of international transactions financed by the applicant, the management capabilities of its international division and whether the establishmet of an overseas branch will enable the applicant to provide more complete service to its customer.

Historical Note

Sec. amd. filed Aug. 18, 1972; repealed, new added filed Sept. 19, 1972; amds. filed: Jan. 12, 1973; Dec. 26, 1973 eff. Dec. 31, 1973. Changed "December 31, 1973" to "December 31, 1974" in (a).

29.4 Limited branches. The Banking Board hereby authorizes the incumbent superintendent for the period ending December 31, 1974, to approve applications of banks and trust companies to open branch offices for limited purposes without submitting such applications to this board.

Historical Note

Sec. repealed, new added filed Sept. 19, 1972; amds. filed: Jan. 12, 1973; Dec. 26, 1973 eff. Dec. 31, 1973. Changed "December 31, 1973" to "December 31, 1974."

29.5 Non-conforming applications. Branch applications of banks and trust companies which do not meet the standards described in sections 29.1, 29.2, 29.3 or 29.4 of this Part shall be referred to the Banking Board for decisions, and such sections shall not apply thereto.

Historical Note

Sec. added, filed Nov. 3, 1969; repealed filed Aug. 18, 1972; new added filed Sept. 19, 1972 eff. Aug. 9, 1972.

29.6 Report to Banking Board. The superintendent shall give a written report quarterly to the Banking Board of all applications approved pursuant to this Part.

Historical Note

Sec. added, filed Sept. 19, 1972 eff. Aug. 9, 1972.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ELIGIO GIBOYBAUX, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 555 EAST 191ST ST NEW YORK, N.Y.

That on the 9 day of APRIL, 1976, deponent personally served the within APPELLANT'S BRIEF upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 2 true copies of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United Stated post office department within the State of New York.~~

Names af attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

PAUL J. CURRAN
UNITED STATES ATTORNEY
ATTORNEY FOR DEFENDANT-APPELLEE, SMITH
1 ST. ANDREWS PLAZA
NEW YORK, N.Y.

MILBANK TWEED, HADLEY & MC CLOY
ATTORNEYS FOR DEFENDANT-APPELLEE,
CHASE MANHATTAN
1 CHASE MANHATTAN PLAZA
NEW YORK N.Y.

Eligio Giboybaux

Sworn to before me this
9th day of April, 1976

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Bronx County
Commission Expires March 30, 1977